THE ADMINISTRATION'S THEORY OF A CONSTRUCTIVE POLICY CONCERNING COMBINATIONS

I. Address by President Taft.

Ladies and Gentlemen: I understand generally that this is a discussion of the question of the legality and illegality of industrial combinations, and that it involves incidentally the question of the enforcement of the anti-trust law of the United States, and the anti-trust laws of the states. I have been engaged for twenty years in construing the anti-trust law of the United States, and I think I know what it means. I have been told that the business people of the community do not know. I have observed that those who are not in the particular industrial combination that violates the law, but who are in competition with it, understand exactly the application of the law to that industrial combination.

I believe that the law has been explained by the Supreme Court of the United States in such a way that most business men can understand it, if they desire to. I recognize the fact that it renders unlawful, combinations and agreements which before its passage were regarded as proper avenues of business enterprise, and that it is very difficult to secure conviction of any person for violation of that law by a jury when it is supposed that the conviction is going to send men to prison. I am in favor of the enforcement of the law, but I believe in enforcing it in the way which is best adapted to secure compliance with it. I think it ought to be done by equitable proceedings directed toward the transaction itself, until the public and the business men are educated up to understanding what it is. I think that we must retain the law, my friends. I do not think we can permit the gathering together of these great industrial combinations that are illegal, merely by a desire to secure a reduction in the cost of production. Up to a certain point, it is true that the accumulation of plant will reduce the cost of production, but beyond that when you lose the benefit of the personal equation of the manager,

and when you enlarge the plant so that it covers the country, you increase the expense of the production rather than reduce it; and the accumulation after that, therefore, is not for the purpose of reducing the cost of production, but it is for the purpose of controlling the business and controlling prices.

Now I am not in favor of persecution or running amuck among the businesses of the country. That is not the policy of the government, but it is to treat that law as any other law, and enforce it so long as from legitimate sources of our information we find violations of it, and so long as the law is on the statute book we propose to continue that policy; but we are not engaged in trying to strike down the business of this country. Where combinations of this sort show themselves willing to come within the law, the attorney-general is only too willing to enter a decree by consent, if need be, enforcing the law and dividing up the great combinations into lesser combinations.

The operation of the Tobacco Company and the Standard Oil decrees are pointed to as an indication that they are ineffective. Nobody can say that. They are great combinations, the division of which and the effect of the division of which you can not understand until two or three years have passed. The increase in the value of the stock is doubtless due to the competition—in the desire to secure control of one company or the other, and until two or three years have passed, you can not speak of the effectiveness of the decrees of the Supreme Court. My own judgment is that a decree entered as this is, with a continuing injunction, is the most effective method of enforcing the competition or the motive for competition that is needed to break up the control of prices. It is a serious problem, and I do not speak with confidence or certainty. I only speak with the judgment that I have formed from a study of the law and an observation of its effect that a judicial experience of eight or ten years and an executive experience of three or four have given me. We can not afford to be under the absolute control of a few men in business, any more than we can in any other branch of life, and we must take such steps as are necessary to protect ourselves against control.

There are some funny things in politics and in government, and some opportunity, if you have a sense of humor, to enjoy looking into human nature as it is. The fact is if you did not have a sense

of humor in carrying on an office like that of President of the United States, you would get so many jolts that it would use up all your nervous system.

Now, you remember in 1904 and 1908—I remember because I was in the campaign in those years—that we were calling out, and both sides were calling out, and there was a terrific noise about the enforcement of the anti-trust law, and everybody that was said to be progressive was bloody about the enforcement of that law. Well, I got a lawyer who I thought knew how to organize a business office, and made him attorney-general, and he got lawyers about him who were organized for the purpose of carrying on litigation in courts, and not for the purpose of running headlines in newspapers. We went ahead and began to enforce the anti-trust law against every combination that was brought properly to our attention. It was not very long before I met those same progressive gentlemen who were engaged in demanding the enforcement of the anti-trust law coming the other way and saying, "Here, you are interfering with business, you have no thought to the benefit of the public." Well, it just took my breath away. Nothing had been done with the law —it still remained on the statute book. It was there for enforcement under the oath that I had taken as President of the United States, and yet I was greeted from every part of the country with the statement, "You are destroying business." I was merely trying to carry out the promise I made in the last campaign, and the oath I had taken. The operation was misunderstood. It was supposed to be very much more destructive than it really was. Business men who never had violated the law were not quite certain whether they had or not, and they became frightened, and there was a kind of panic, and I found myself in that situation which, had I not thought it comic, I would regard as very serious.

We can supplement this statute. We can supplement it by an incorporation act that shall bring close supervision to these great industrial enterprises, that shall provide for the punishment of their officers when the law is violated, just as the officers of the national banks are punished, so that stockholders if they are not themselves guilty, need not be made to suffer. We can make a law which shall give to legitimate business that shall come within the supervision of the United States government, that protection that will make all

business possible and easy and legitimate, and I hope will secure the prosperity that legitimate business is entitled to.

I have not had the benefit of what has gone before, and if I have said anything that was an absolute contradiction of what anybody else said, I apologize to him, but I do not take back the proposition.

THE ADMINISTRATION'S THEORY OF A CONSTRUCTIVE POLICY CONCERNING COMBINATIONS

II. Address by George W. Wickersham,

Attorney-General of the United States.

I have been asked to give you in a ten or fifteen minutes' informal talk, my ideas of the topic of the evening, "The Elements of a Constructive National Policy with Reference to Combinations." Now the last two decisions of the Supreme Court of the United States upon the Sherman anti-trust law have resulted in a rather confused and somewhat paradoxical state of public opinion. Two schools of interpretation of that act had grown up, one which would have given to it a meaning that would have made it an absolutely unenforceable law, by rendering illegal every contract which in any degree tended to interfere with competition, and another, which gave to it a reasonable interpretation by making illegal only those contracts and so on, which directly and materially and unduly restrained the ordinary flow of commerce among the states. The Supreme Court, in the last two decisions gave to the act the latter interpretation. One would not have thought that that result would have been received with great satisfaction on the part of the great body of business men who are not concerned in great monopolies, not interested in maintaining unfair competition, but desirous of being protected from the unfair competition of their wealthier and more fortunate neighbors, and not desirous of having all corporate effort of every kind put under the ban of the law; and yet there arose immediately after these decisions two currents of criticism. One maintained that the law had been emasculated and was no longer of any consequence and no longer a possible instrument to effect the ends had in view by those wise men who framed it. Another rather steadily disseminated through the community the thought that after all these decisions left the law so that it would operate to make every kind of co-operative undertaking in business illegal, and that every corporation, every association, still remained in terror of the law, and every business man went to his office, so to speak, with a halter

round his neck. But as a matter of fact, the Standard Oil Combination had to be divided up into thirty or more separate distinct companies, and the Supreme Court sent back to the Circuit Court the great tobacco combination to be so divided by that court as to end the monopoly which it had up to that time enjoyed. And the question then arose, "Is it possible to break up a great combination of business like this, without bringing ruin and destruction to a vast, widely extended business?" With infinite pains there was worked out a solution to that problem, and that great aggregation of capital and industry was divided up into fourteen separate and distinct companies, each one large, well organized, well equipped; not one of them having a large enough amount of the business to constitute a menace to the community, each one fitted to compete with every other,—because if they were not all strong, competition would soon have ended in a renewal of the old monopoly.

Well, again there were two schools of criticism. There were those who were disappointed because, as with the wave of a wand, conditions that had existed twenty years ago were not restored. Of course, it was impossible that should be. These things have grown up through years. They cannot be torn asunder and the conditions which had existed two decades ago reinstituted in all their original vitality. But the first fruits of that disintegration have already been made apparent in Kentucky, where during the last two or three months they have had a competition in the purchase and sale of tobacco leaf greater than has been known in years before, because instead of there being one buyer fixing the price he would pay, there was active competition between eight or ten large, competitive, well-equipped buyers. Then, of course, there were the critics who regretted greatly that the national administration should have succeeded in working out a problem of this character without the embarrassment which would have attended upon a ruin of vast interests and the destruction of great business, and then in the third place, there were those who hoped for ruin, who were not content with seeing the companies divided up into separate parts, each equipped to carry on its own part of the business in competition with others, but who wanted to see a widespread destruction which would have resulted from any other kind of disintegration. All these people were disappointed . The plan adopted was the first step in a sound, constructive national policy. It showed that the Sherman law was

adequate to reach the greatest evil against which it was directed, to take the vast organizations which had acquired such wealth, such a control of the business as to become powers menacing the stability of free institutions, and to resolve them into smaller elements from which no such fear need be apprehended. The same principle has been applied since, is being applied now, and will, I believe, result in working out satisfactory results in its application to these great aggregations which in the past have brought so much trouble to the minds of lovers of their country, and will make it possible to carry on these great businesses in a way which is essential to the welfare of a great commercial people, without at the same time exposing them to the dangers which have in the past seemed at times to be overpowering.

But the Sherman law also applies to some things besides monopoly. It was directed also against all contracts, combinations and conspiracies that unduly impose an unfair restraint upon commerce and business. Until a few years ago, until, to a large extent, a very recent date, there was in every line of business to be found some kind of association or body or contract between the various concerns dealing in that line of business, which sought to control the amount of business each of the members might do, the prices which each one might charge, the way in which each might do his business, and which were directed to the exclusion of other people from coming in and competing in that business. They were almost always unfairly managed, and almost without exception, if you could get the history of these organizations, you would find that they were unfairly managed to the people who took part in them, and were always unfair to the outside public. Now, many of them have been broken up, some of them are defendants in suits by the government to-day. All of them are illegal, but some of them still persist. I had a letter, a day or two ago, from a merchant in a western state, who told me that, desirous of buying a large amount of a certain commodity in his business, he wrote to ten producers, manufacturers, asking for bids. He got two replies. The representative of one of those who bid came in to see him, and was very insistent about taking his order. The merchant said, "I can't decide now because I have written to a number of other manufacturers and am waiting to hear from them." Whereupon his visitor took out of his pocket six or seven of the letters the merchant had written to

the other producers, and said, "My dear sir, don't fool yourself, If you want that product, you will buy from me." Now that was an actual occurrence. All of those people he had written to were supposed to be independent manufacturers with no connection with each other. Obviously, they had some kind of an organization, or some kind of understanding among themselves to stifle competition, and to compel a man who was buying that product to buy in the way they agreed, and under the compulsion that their association imposed. Of course it was illegal; of course they knew it was illegal; of course it was unfair to the buyer; and it probably was unfair to all except one or two of the stronger of those who were in the association. Now that is one of the things against which the Sherman law was directed, and against which a sound, constructive national policy must protest and must proceed. The Sherman law only applied to that sort of thing, in interstate commerce, laws as old as the hills; because such things were always illegal in every English speaking country.

But there is another phase of this subject. We have been singularly slow, in this country, in legislating intelligently with respect to the most important of all business associations or corporations. The national government has left the subject to the states; the states have dealt carelessly and unintelligently with the subject in almost every instance. One-half, I think it is safe to say, and often a larger percentage, of all the trouble that has arisen with respect to the control over industry, the unfair control by combinations, has grown out of the lax laws relating to the organization of corporations in the different states of the United States, and out of the fact that while the national government has plenary power over interstate commerce under the constitution, and the Supreme Court has given broader and broader interpretation to that power, yet in dealing with the most vital of all questions of interstate commerce, the national government has only legislated negatively and restrictively. Now two schools of thought obtain with respect to that subject. President Taft as the leader of the national progressive school of thought has advocated the passage of a national incorporation act, under which there may be formed, subject to one set of regulations, corporations adequate to the conduct of great business, and yet so safeguarded and protected in that organization and conduct, as to make it impossible for them to become vehicles of fraud on the

public, or of the attainment of undue control and monopoly. There is much opposition to that suggestion. It is true the national government has created a national law for the formation of banks, under strict supervision, which has worked so well that, relatively speaking, bank stocks command a higher price than any other stocks in the community. It is true that congress did create a few corporations for the construction and operation of railroads, but later abandoned that policy; and a great many thoughtful and intelligent people dread the centralization of power in the national government which would result from the establishment of a system of national incorporation.

Then there are some states like our sister across the river, who derive a large revenue from this important enterprise of creating corporations, and those states, like all who derive a large revenue from an established industry, discover a singular unwillingness to give it up. And so these two forces, first the force which always presses against a new thing, then the forces which derive their strength from established revenue, which would be affected by the proposed change; and a third force, namely, the dread of centralization, rooted in the old states' rights idea,—all combine to prevent any progress being made along this line of formative, constructive national legislation by providing for the organization and conduct of corporations. Well then, another way of dealing with the subject is suggested, and that is by legislating, negatively again, using this great power to regulate interstate commerce by saying such commerce shall be only conducted by certain organizations that possess particular qualifications. It is suggested that congress enact a law providing that on and after a certain date no corporation shall carry on business among the states unless it is organized under a law and under a charter which contains certain specified things. The foremost bill embodying that idea that I know of, and indeed the most intelligently prepared measure expressive of the negative principle of regulation is the bill introduced into the senate by Senator John Sharp Williams of Mississippi. Probably, as far as future organizations go, such a measure would be very effective. My fear about it is that to say that after we have gone on for years under a system allowing the states to create corporations, provide the law of their being, and authorize them to do all sorts of things, the federal government following a perfectly *laissez faire* policy,

and after millions of money have been invested in faith of that kind of government, a law that provided that unless on or before a certain day no interstate commerce should be carried on by any corporation unless organized in a way specified, would be impossible of being carried out and would lead to great confusion, and loss.

Then too, I do not believe in dealing with the subject in a negative way. I believe that power carries with it responsibility; that the national government, possessing what has been declared a plenary power, exclusive of any other power, over this subject, having exercised that power by saying that thou shalt not, should face the responsibility and say what thou canst; and that until the congress of the United States approaches the subject in that way, no solution can be found for this fundamental problem in connection with the conduct of business and the application of the law to combinations and to competition. I say, until congress approaches that subject in that formative, constructive way, I do not believe the problem can be solved. As it seems to me, the three elements of a constructive national policy are, first, the enforcement of the Sherman law in its application to the great combinations which threaten or have threatened monopoly, by resolving them into elements, no one of which shall be large enough to be a public menace. Second, the application of the Sherman law to the destruction of all agreements between independent manufacturers or factors in interstate business which unduly and unjustly interfere with the free flow of commerce among the states. And, third, in the enactment of some sound, sane, intelligently conceived national law for the creation of corporations, for the conduct of business among the states and with foreign countries.

Now this is a vast subject, a subject that directly or indirectly touches every citizen. It is one upon which no one can have any patent nostrum; it is one upon which every intelligent man should have some thought; it is one that must be solved by the comparison of facts and by threshing them out in that great crucible in which English speaking people have always progressed, namely discussion, public and private, resulting finally in legislation which shall be the expression of the best thought of the most intelligent portion of the community. Therefore I welcome the opportunity to come here and meet a body of earnest men and women, interested in this sub-

ject, to contribute my mite towards the discussion, a contribution that I make with considerable diffidence, because it has been my duty to administer and apply the existing law, not always to the intense satisfaction of those against whom it was applied, but always with the earnest desire to apply it where the mandate of congress had said it should be applied.